Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1044

WILLIAM C. BUSH,
Petitioner

vs.

WILLIAM R. LUCAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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December 22, 1979

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vs.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner William C. Bush (whom we hereinafter call "Bush") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit as entered on 12 July 1979 on that certain appeal styled William C. Bush, Plaintiff-Appellant, v. William R. Lucas, Defendant-Appellee, and there assigned Docket No. 77-1615.

OPINIONS BELOW

The opinion of the Court of Appeals has been published at 598 F. 2d 958. A copy of that opinion comprises Appendix A1 to this petition. The unpublished opinion of the United States District Court for the Northern District of Alabama comprises Appendix B to this petition.

JURISDICTION

By judgment rendered on 12 July 1979 and entered on the same day, the United States Court of Appeals for the Fifth Circuit affirmed an order of the United States District Court for the Northern District of Alabama granting summary judgment in favor of the present respondent (whom we hereinafter call "Lucas"). Bush timely (Appendices A2 and A3 hereto) filed a petition for rehearing in the Court of Appeals and a suggestion that such rehearing be en banc. On 4 October 1979, the Court of Appeals denied the petition for rehearing and for rehearing en banc. (Appendix A4 hereto.) Bush invokes the

jurisdiction of this court under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does administrative relief with respect to an unconstitutional demotion of a federal civil service employee preclude a Bivens-type damage suit by the employee against a federal executive official for alleged violations of the employee's First or Fifth Amendment rights in course of the defendant's procuring of the demotion?

2. If a Bivens-type claim is maintainable by such employee against such defendant, is the plaintiff employee entitled to recover, whether in one or more fora, in the same measure as a plaintiff who is not a federal employee?

3. Do Barr v. Matteo, 360 U. S. 564 (1959), and Butz v. Economou, 438 U. S. 478 (1979), shield the Director of the George C. Marshall Space Flight Center from suit for an allegedly

defamatory utterance made in the course of a retaliatory run of events pursuant to a conspiracy to punish the plaintiff federal employee for having exercised his rights of freedom of speech and petition to Congress?

4. Where, in a suit of the sort mentioned in Question 3, the non-answering defendant Director moves for summary judgment on the sole ground of official immunity and the plaintiff employee timely and appropriately invokes Rule 56 (f) of the Federal Rules of Civil Procedure and serves and files numerous preliminary interrogatories, may a United States district court conformably to the accepted and usual course of judicial proceedings: (a) strike the interrogatories sua sponte and remit the plaintiff, for purposes of discovery pending disposition of the motion for summary judgment, to the taking of the deposition of only the defendant; (b) accord probative force to partisan and conclusionary affidavits; and (c) view the materials considered on the motion in any light other than a light most favorable to the

non-moving plaintiff?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the following constitutional provisions, statutes, rules and regulations the relevant parts of which are set forth in Appendix F hereto:

Art. III, § 2, cl. 1, U. S. CONST.;

Amend. I, U. S. CONST.;

Amend. V, U. S. CONST.;

Amend. V, U. S. CONST.;

5 U. S. C. §§ 1301, 3302, 5596, 7511, 7701;

28 U. S. C. §§ 1331, 1442(a)(1), 1446;

Civil Service Rule 5.1, Exec. Ord. No. 10577, 19 Fed. Reg. 7521 (1956);

5 CFR §§ 752.101, 752.104, 752.202, 752.203, 752.401, 772.101, 772.102, 772.301, 772.305, 772.307, 772.308, 772.309, 772.310 and 772.312.

RULE 56 (f), FED. R. CIV. P.

STATEMENT OF THE CASE

Both Bush and Lucas are career civilian employees of the United States Government. At all material

times, Bush has been an aerospace engineer employed at the George C. Marshall Space Flight Center (hereinafter called "MSFC") and Lucas has been Director of that major field facility of the National Aeronautics and Space Administration (hereinafter called "NASA").

In course of a major reorganization in 1974, MSFC management assigned Bush to a new position. He found few if any actual duties corresponding to the description of the position. Intra-organizational efforts to induce MSFC management to change or abolish the position were unavailing. In separate appeals to the Civil Service Commission (hereinafter called "the CSC"), Bush assailed both the classification of the position and his assignment to the position.

During the pendency of those administrative "appeals," in the spring of 1975, the media attributed several public statements to Bush to the effect that his job was a falsehood, a travesty and worthless; and that he was reporting what

appeared to be a fraudulent use of federal funds. Some of the statements received national dissemination by way of a news release.

When certain media representatives asked Lucas, in late June of 1975, about Bush's statements, Lucas said:

> Mr. Bush has made certain statements to the effect that he does not have meaningful work to do. I have had that statement [sic] investigated and I can say, unequivocally, that such a statement has no basis in fact.

In August of 1975, MSFC management commenced an adverse action against Bush for having made the public statements attributed to him. After Bush's written and personal answers to the notice of proposed adverse action, Lucas, as agency deciding official, reduced Bush two General Schedule grades in the civil service and assigned Bush to a different position at MSFC. Bush timely appealed the adverse decision to the CSC. The initial CSC decision (Appendix C hereto) sustained the agency

action. On Bush's petition, however, the CSC's Appeals Review Board, as that body was called in July of 1978, rendered a decision (Appendix D hereto) reversing the initial CSC decision and recommending that Bush be restored retroactively "to his former position, grade and pay...." (App. D, d-26.) Applying a Pickering[1] type balancing test (ibid., d-25), the Appeals Review Board based its decision upon a perceived unjustifiable "abrogation of the exercise of free speech" (ibid., d-25). After the Civil Service Commissioners denied (Appendix E hereto) NASA's petition to reopen the Appeals Review Board's decision, MSFC took the corrective action recommended by the Board.

Administrative review of Bush's reduction-in-grade lasted from December of 1975 until October of 1978. While such review was still pending at the first level of the CSC's appellate hierarchy, and on the day before an Alabama statute of

[1] Pickering v. Board of Education, 391 U. S. 563 (1968)

limitations[2] would have barred the action, Bush sued Lucas individually in a state court. In that suit, Bush sought to recover damages for defamation (Complaint, Counts One through Three) and for conspiracy "to deprive... [Bush] of his constitutional rights of freedom of speech and of petition to Congress and to reduce...[him in civil-service grade]..." (ibid., Count Four, 1st of two ¶¶ numbered "2"). The defamation allegedly lay in the falsity, malice and publication of Lucas' utterance (ante, p.7) about one of Bush's prior statements' having "no basis in fact." The conspiracy allegedly lay in Lucas and his co-conspirators' conduct in having concocted and consummated the adverse personnel action against Bush in retaliation for the latter's having exercised his aforementioned First Amendment rights. (Complaint, Count Four, passim.)

[2] Tit. 7 § 26, Ala. Code 1940, as "Recompiled,"--- now Subdivs. (4) and (5) of § 6-2-39, Ala. Code 1975, effective 31 Oct. 1977.

Lucas timely removed the suit to the United States District Court for the Northern District of Alabama. Jurisdiction in that court rested on 28 U. S. C. § 1442 (a) (1), relating to the removal of actions begun in state courts against officers or agencies of the United States for acts under color of office, etc.

After such removal of the suit, and without answering the complaint, Lucas moved alternatively for dismissal of the complaint or for summary judgment. Apart from the general ground of failure to state a claim upon which relief could be granted, Lucas rested his motion exclusively upon the doctrine of absolute executive immunity under Barr v. Matteo, 360 U. S. 564 (1959). His initial moving papers consisted of his motion, his affidavit and a copy of the official description of his position as MSFC Director. He later added affidavits of other NASA officials, supplemented by organizational charts and other ancillary papers, to meet affidavits intermediately served by Bush in opposition to the motion for summary judgment.

Before Bush responded to the Lucas motion, the Federal Employee Appeals Authority (hereinafter called "the FEAA") rendered the initial CSC decision (Appendix C hereto) on Bush's administrative appeal from MSFC's reducing him in grade. Lucas' counsel informally called that administrative ruling to the attention of the district court at some time prior to that court's ruling on the Lucas motion.

After serving numerous preliminary interrogatories upon Lucas, Bush invoked Rule 56 (f) of the Federal Rules of Civil Procedure in his interim response to the motion for summary judgment. By motion supported by affidavits, he asked for time to make discovery sufficient to establish an adequate factual record for consideration of the issues. The trial court struck the Bush interrogatories sua sponte and limited discovery, pending disposition of the motion for summary judgment, to the taking of Lucas' deposition upon oral examination which, if Lucas gave responsive and straightforward answers, was not to last more than three

hours. (Order of 28 Sep. 1976).

After completion of the limited discovery permitted by the district court, and after supplementation of both the Lucas motion and the Bush response, the district court granted the motion. (App. B, b-1.) In a memorandum-opinion (App. B, b-2 through b-17), the district court considered the defamation claim and the conspiracy claim discretely. Treating the former as only a common law claim with no constitutional overtones or implications (ibid., b-7, b-8), the district court regarded Barr v. Matteo as controlling (ibid., b-4) on the point of Lucas' immunity to suit on that claim, as distinctly considered.

While regarding the conspiracy claim as asserting violations of Bush's constitutional rights and as being "based on the seminal case of Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U. S. 388 (1971)..." (App. B, b-12), the district court nevertheless concluded that the availability of administrative

relief, albeit from the Government and not from Lucas (ibid., b-15, n. 5), precluded Bush from maintaining suit against Lucas for "damages based," as the district court said, "on...[Bush's] demotion, allegedly contrived as a punishment for...[Bush's prior public] statements" (ibid., b-16).

In affirming (598 F. 2d 958 [5 Cir. 1979]; Appendix A1 hereto) the judgment of the district court, the Court of Appeals substantially adopted the view of the district court. The Court of Appeals regarded this Court's intervening decisions in Butz v. Economou, 438 U. S. 478 (1979), and Davis v. Passman, ___U. S. ___, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), and the intervening administrative restoration of Bush to his former grade, position and pay (App. D, d-25--d-26; App. E, e-3) as buttressing the district court's reasoning and ruling. The Fifth Circuit said that it affirmed the district court

> [b]ecause Butz v. Economou affords the defendant immunity in the defamation part of this claim; and the rationale of Davis v.

Passman forecloses a cause of action for damages under the circumstances of this case....

(598 F. 2d at 959;
Appendix A1 hereto,
a1-6.)

REASONS FOR GRANTING THE WRIT

I. TO SETTLE IMPORTANT QUESTIONS OF FEDERAL LAW

The question of what, if any, administrative remedies pre-empt a Bivens-type claim has not been settled by any decision of this Court. It is an important question. The precise question here presented--whether the administrative remedy of retroactive restoration in grade, pay and position under the Back Pay Act (Appendix F, f-2) as implemented by the CSC Regulations pre-empts a Bivens-type claim for residual damages unremedied by the administrative proceedings---potentially affects upwards of two million civilian employees of the federal government. Cognate questions as to the relationship between administrative remedies and judicial remedies for abuse of power by federal officials potentially affect scores of millions of persons who may become the victims of official abuse of power, position and privilege.

In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U. S. 388 (1971), this Court held that federal trial courts should afford a litigant a damage remedy against federal officers for violation of his Fourth Amendment rights. Overall, the subsequent course of decisions in the lower federal courts has been in the direction of expanding the Bivens holding. Only Last Term, this Court followed Bivens in reversing the Fifth Circuit's en banc decision in Davis v. Passman, ___U. S. ___, 99 S. Ct. 2264, 2276--2277 et passim, 60 L. Ed. 2d 846, 862 et passim.

In the case at bar, the Fifth Circuit has given both Bivens and Davis a restrictive reading, to arrive at a result which is consonant with neither and which is unprecedented. For the first time, a United States Court of Appeals has held that the administrative remedy of restoration in grade, pay and position entirely precludes a damage remedy against a federal executive official, in his individual capacity, for violations of a plaintiff civil service employee's First Amendment rights.

Such result is attained, apparently, by regarding the administrative remedy as an "equally effective alternative remedy" (598 F. 2d 961; App.A1, a1-13) within the meaning of the Davis and Bivens dicta in that regard---although the Fifth Circuit nowhere cites Bivens in its 12 July 1979 opinion.

In the absence of any clear Congressional interdiction of the traditional judicial remedy for an accomplished tort, the Fifth Circuit decision remits Bush to an inadequate administrative remedy largely shaped by regulations adopted under broad and imprecise delegations. The remedy is inadequate because it neither fully compensates Bush for his outlays and injuries nor affords any deterrent to future abuse of power.

Would it not be more consonant with the Constitution, more in conformity with general remedial doctrine, and more fair, to accord cumulative remedies in the factual situation shown, however imperfectly, in this case?

We suggest that the law should accord federal civil service employees concurrent remedies in such situations: an administrative remedy for partial relief, in the form of restoration in grade and rank, with back-pay; and a suit against the alleged wrongdoers to recover residual damages---i. e., all the damages recoverable in analogous common law actions, e. g., malicious prosecution, less an amount equal to the back-pay award. In any event, would it not more nearly comport with received traditions of justice and of fundamental fairness for courts to fashion their remedies to fit litigants' rights rather than fashion litigants' rights to fit partial remedies?

A final unsettled question is as to whether a defamation claim of the sort asserted by Bush, in the context in which he asserts it, does not

implicate the Fifth Amendment. If it does, Lucas clearly is shorn of the Barr shield, even as against the defamation claim--as he already is, in any event, as to the conspiracy claim. Though when viewed in isolation, and as a mere exercise in pleading, the defamation claim might appear intrinsically to involve no more than an effort to obtain redress, under state law, for injury to reputation, that claim takes on constitutional significance when viewed, as it must be, as addressing an episode in a retaliatory run of colorably official events the first of which antedated the allegedly defamatory utterance and all of which threatened Bush's tenure and career. The interest, then, which Bush seeks to vindicate in his defamation claim is an interest which entails more than his general reputation. It is "more tangible" [Paul v. Davis, 424 U. S. 693, 701 (1976)] than reputation. But by divorcing the defamation claim from its context, the district court deconstitutionalized it; and the court of appeals followed suit. When considered in the context of an on-going conspiracy

to punish Bush for presumably having made the public statements attributed to him, the defamation claim falls well within the penumbra of the Fifth Amendment and, we respectfully submit, should be evaluated by this Court as part of a review of the Fifth Circuit's decision.

II. TO RESOLVE AN EMERGING CONFLICT AMONG THE COURTS OF APPEAL

In the case at bar, the Fifth Circuit in necessary effect has held that a federal civil service employee's administrative remedy for a retaliatory demotion precludes a suit by that employee to recover damages from a defendant federal official for conspiring with others to bring about such demotion in reprisal for the employee's having exercised certain of his First Amendment rights. In Fitzgerald v. Seamans, 553 F. 2d 220, 226 (D. C. Cir. 1977), the District of Columbia Circuit, albeit in a statute of limitations context, regarded a similar damage suit as an independent remedy, the intrinsic character of which was not affected by the pendency of an administrative appeal to the CSC to test the validity of an abolition of a civil service position. And in Hernandez v. Lattimore (2 Cir. No. 78--2098, decided 6 Dec. 1979), the Second Circuit two weeks ago held that the 1974 Amendments

to the Federal Tort Claims Act did not pre-empt a Bivens-type action. A copy of the Second Circuit's MS opinion in that case comprises Appendix G to this petition. There is, thus, an emerging, if not already emerged, conflict in principle among the decisions of the several courts of appeal with respect to pre-emption vel non of Bivens-type actions by statutory remedies or by blended statutory and administrative remedies. Such conflict, we submit, should be resolved before it begets wide-spread lack of uniformity.

III. TO CORRECT A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

Although it did so sub silentio, the court of appeals in this case sanctioned several serious departures, by the district court, from the accepted and usual course of judicial proceedings. We refer to the district court's severe curtailment of discovery pending disposition of Lucas' motion for summary judgment; the district court's according probative value to the partisan and conclusionary affidavits proffered by Lucas in support of his motion; and the district court's failure to view the materials considered on that motion in the light most favorable to the non-moving party, and with all legitimate inferences favorable to the existence of a genuine issue of material fact being drawn by the court. When one considers not only the number of motions for summary judgment regularly served and filed in actions pending in the United States district courts but also the grave consequences of those courts' granting such motions without the

development of adequate records, one must readily appreciate the importance of those courts' adhering to established standards for the disposition of such motions. Here, the district court first precluded discovery from any of Lucas' alleged co-conspirators; the district court thereafter accorded substantial weight to partisan and conclusionary affidavits proffered by Lucas; then, and in consequence of those antecedent departures from the accepted and usual course of judicial proceedings, the district court granted a summary judgment on an inadequate record in a case involving constitutional issues, unprobed charges of conspiracy and malice and, above all, an unsettled state of the law on the very issue which the district court conceived to be dispositive of the entire case. Such deviations should not be sanctioned by courts of appeal. We sincerely submit that the court of appeals' acquiescence in such departures on the part of the district court should call for an exercise of this Court's supervisory power.

CONCLUSION

For the reasons set forth above, Bush submits that a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

December 22, 1979

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APPENDIX A1

[598 F.2d 958]

William C. BUSH, Plaintiff-Appellant,

v.

William R. LUCAS, Defendant-Appellee.

No. 77-1615.

United States Court of Appeals,

Fifth Circuit.

July 12, 1979.

Aerospace engineer brought damage action against director of federal space flight center to recover for alleged defamation and alleged retaliatory demotion because of engineer's televised comments concerning "meaningfulness" of his job. The United States District Court for the Northern District of Alabama, Sam C. Pointer, Jr., J., rendered summary judgment for director and engineer appealed. The Court of Appeals, Roney, Circuit Judge, held that:

(1) as regards defamation claim, director's statement to television reporter that he had had engineer's statement investigated and could say unequivocally that such statement had no basis in fact was absolutely privileged since it came on an inquiry regarding the center, its employees and engineer's employment related statements and director had the responsibility to respond and there was no showing that statement was otherwise beyond the "outer perimeter" of director's duties, and (2) there was no right of action under the Constitution for damages based on retaliatory demotion in view of available administrative remedy under Civil Service Commission regulations.

Affirmed.

1. Libel and Slander

Statements made by director of federal space flight center to television reporter that director had had aerospace engineer's statement as to "meaningfulness" of engineer's job

investigated and could state unequivocally that such a statement had no basis in fact was absolutely privileged since statement was not shown to have been beyond the "outer perimeter" of director's duties, in that statement came on an inquiry regarding the center, its employees and engineer's televised employment related statements and director had the responsibility to respond. U.S.C.A.Const. Amend. 1.

2. United States

No right of action in damages under the [*959]
Constitution lay against director of fed-*eral space flight center for alleged retaliatory demotion of federal space engineer because of engineer's televised statements as to "meaningfulness" of his job, engineer was a civil service employee and had available to him various administrative remedies under Civil Service Commission regulations. U.S.C.A.Const. Amend. 1.

Harvey Elrod, Decatur, Ala., for plaintiff-appellant.

J. R. Brooks, U. S. Atty., Henry I. Frohsin, Asst. U. S. Atty., Birmingham, Ala., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, SIMPSON and RONEY, Circuit Judges.

RONEY, Circuit Judge:

In this action for damages against the director of a federal space flight center for alleged defamation and an alleged retaliatory demotion in violation of First Amendment protections, the district court granted defendant's motion for summary judgment on the grounds that he was shielded by absolute immunity under *Barr v. Matteo*, 360 U.S. 564,571, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and that plaintiff had no constitutional cause of action in view of the available administrative remedies under the

Civil Service Commission regulations. 5 C.F.R. §§ 752.201-752.402 (1974).

Subsequent to the issuance of the district court's summary judgment, the Supreme Court decided *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1979), involving immunity of federal officials from suit. At the time of oral argument in this case the Supreme Court had also granted a petition for certiorari in our *en banc* decision in *Davis v. Passman*, 571 F.2d 793 (5th Cir. 1978), in which this Court had denied an implied cause of action in a sex-based employment discrimination suit for damages against a member of Congress. We withheld decision of this case pending the Supreme Court's review of *Davis v. Passman*.

The Supreme Court has now reversed the *en banc* decision in *Passman* and, with a detailed opinion, ——— U.S. ———, 99 S.Ct. 2264, 60 L.Ed.2d 846 held the plaintiff had a constitutionally implied cause of action for damages for an alleged

violation of the equal protection component of the due process clause of the Fifth Amendment. Because *Butz v. Economou* affords the defendant immunity in the defamation part of this claim, and the rationale of *Davis v. Passman* forecloses a cause of action for damages under the circumstances of this case, we affirm the denial of relief by the district court.

Plaintiff, William C. Bush, is an aerospace engineer and for several years had been a civil service employee at Marshall Space Flight Center. In an interview on Huntsville Television Station WHNT, Bush stated that he was not productively employed. The same day, *The Huntsville Times* quoted Bush as having said that his position at the Space Flight Center was "a falsehood, a travesty and worthless." Nearly a month later Bush appeared on another WHNT-TV interview in which he made statements to the effect that he had meaningful work to do only a small percentage of each day. Mr. Bush's various statements were disseminated nationally by the wire services and

appeared in newspapers in at least three states other than Alabama.

In commemoration of the Marshall Space Flight Center's fifteenth anniversary, defendant William R. Lucas, the director of the Center, presided at a press conference held several weeks following plaintiff Bush's second televised interview. After what Bush asserted was the conference's conclusion, a WHNT television reporter asked Lucas to respond to Bush's charges that he did not have enough meaningful work to do. Bush claims he was labeled a liar by Lucas' reply that "I have had [Bush's] statement investigated and I can say unequivocally that such a statement has no basis in fact."

[*960]

*Personnel action was initiated several months after Lucas made the alleged defamatory statement to remove Bush from his position. After a hearing, Lucas, as deciding official, notified Bush of his reduction in grade from GS-14 to GS-12. Bush appealed the adverse action to the United States Civil Service Commission, which

sustained the agency's action.

Plaintiff Bush commenced this action in state court, and on motion by defendant Lucas the case was removed to federal court. Plaintiff sought damages from Lucas for the allegedly false statements Lucas made about Bush on June 25, 1975, and for Bush's demotion as a federal government employee, with attendant reduction in salary. Bush alleged that his demotion and Lucas' comments were motivated by Lucas' malicious intent to punish Bush for public comments he had made about his job.

Defamation Claim

The district court held that defendant Lucas is protected by absolute official immunity from liability for the defamation claim. *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Plaintiff Bush argued if any immunity is available it is qualified by a good faith standard. *Butz v. Economou*, 438 U.S.478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1979).

For purposes of deciding the motion the district court assumed as true plaintiff's allegation that Lucas' press statement was false, motivated by malice and that summary judgment for defendant Lucas would be appropriate only if he was protected by absolute immunity.

Viewing *Barr v. Matteo, supra,* as controlling, the district court concluded Lucas was entitled to absolute immunity as to any claim based on his statements to the press. In *Barr* the Supreme Court held that, despite allegations of malice, statements made by a federal executive official within the "outer perimeter" of his line of duty fall within the privilege of absolute immunity against defamation actions.

Barr involved a press release by Government officials announcing an intention to suspend the plaintiffs because of the part which they had played in formulating a plan for utilization of certain agency funds. Plaintiffs sued for libel, alleging malice. The Court said it had granted certiorari to decide the precise issue of

whether the defendant's "claim of absolute privilege should have stood as a bar to maintenance of the suit despite the allegations of malice made in the complaint." 360 U.S. at 569, 79 S.Ct at 1338. The Court then held that "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint." 360 U.S. at 575, 79 S.Ct. at 1341.

[1] We are unable to distinguish the instant case from *Barr*. Lucas' statement to the press fell well within his duties as director of the space center. Although Bush's complaint alleges that Lucas' statement was beyond the "outer perimeter" of his duties, plaintiff offered no evidence to support his conclusion. Defendant's statement to the press came upon an inquiry regarding the Center, its employees, and Bush's employment related statements. Lucas had a responsibility to respond. *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872-873 (5th Cir. 1978).

Plaintiff argues that *Butz v. Economou, supra,* would give defendant only a qualified immunity if his actions violated plaintiff's constitutional rights. This argument is irrelevant here because Lucas' statements to the press could not have violated plaintiff's claimed First Amendment rights, even if the demotion may have. The district court noted that the mere speech of one person cannot violate the free speech rights of another.

To the extent plaintiff may be claiming that his (Bush's) First Amendment rights were violated by Lucas' comments at the press conference, the court disagrees. A person's freedom of speech is not abridged by another's speech in reaction thereto, even if assumed to be defamatory.

*Retaliatory Demotion Claim [*961]

[2] Bush claims a right under the Constitution for damages resulting from his demotion in retaliation for his public comments about his

employment.

The district court had before it and followed as controlling our panel decision in *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), which had held Ms. Davis had a right to maintain an action for damages under the Fifth Amendment against a congressman. Although later vacated by the Fifth Circuit *en bank*, the legal analysis in the panel opinion was eventually upheld when the Supreme Court reversed the *en banc* decision. The district court noted that administrative review was available as a means of overturning wrongful demotions or dismissals of civil service employees such as Bush, no such relief being available to the *Passman* plaintiff. Reinstatement was not realistic in that case because plaintiff's former job would disappear with defendant's congressional tenure, which expired the same month of the court's decision. Moreover, the panel of our Court had expressed reluctance to order reinstatement of a representative's personal assistant.

The Supreme Court made the same observation as to the absence of any administrative remedies to Ms. Davis and specifically noted that "were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Davis v. Passman, supra*—— U.S. at——, 99 S.Ct. at 2278. Thus we read *Passman* as not giving an optional remedy in addition to already sufficient remedies for wrongful action of a Government agent, but as an alternative when damage relief is needed.

Under the Civil Service regulations there is a notice and review procedure which permits an employee to challenge adverse personnel actions, including demotions. See 5 C.F.R. § 752.201 (employees covered); § 752.202 (notice and reasons for adverse action must be given); § 752.203 (employee's right to appeal to the Commission); §§ 752.104, 731.202 (standards governing adverse actions); § 752.402 (reversal of adverse action may entitle employee to

restoration retroactive to date of improper action). The district court had before it the following information footnoted in its opinion:

> As already indicated, Bush appealed his demotion and that appeal was heard and the demotion sustained by the Civil Service Commission. Although Bush had the further opportunity to appeal from the Commission to the United States District Court, it does not appear that he did so. The court is not now undertaking any review of the Civil Service Commission's decision, but is simply noting that the demotion, if truly wrongful, was not without redress and plaintiff has had his day in court in another forum to prove the facts he now alleges, while seeking there, admittedly, relief from the government rather than from Lucas personally.
>
> It now appears that plaintiff was administratively restored to his original status from the date of the adverse personnel action several months before the oral argument in this Court.

The district court was correct in concluding:

> In view of plaintiff's administrative review opportunities and the importance of the government's interests in promoting the efficiency and integrity of its public services through its employees, the Court concludes that Bush's public statements about his duties do not rise to the level of constitutional protection such that he can maintain an action in damages based on his demotion, allegedly contrived as a punishment for those statements.

We thus find that the district court correctly analyzed Bush's constitutional claims under the principles that have now been announced in *Davis v. Passman*.

AFFIRMED.

APPENDIX A2

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT Tel 504-589-6514

OFFICE OF THE CLERK 600 Camp St.
New Orleans, La.
July 23, 1979 70130

Edward W. Wadsworth
Clerk

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77 - 1615 - WILLIAM C. BUSH vs.
WILLIAM R. LUCAS

Gentlemen:

The following action has this day been taken in the above case:

An extension of time has been granted to and including August 3, 1979*

Very truly yours,
EDWARD W. WADSWORTH, CLERK

By S/ Julie Harrison
Deputy Clerk

cc: Mr. Harvey Elrod
Mr. Henry I. Frohsin

*MUST BE PHYSICALLY FILED IN THIS OFFICE BY THIS DATE.

APPENDIX A3

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Tel 504-589-6514
600 Camp Street
New Orleans, La.
70130

Edward W. Wadsworth
Clerk

August 7, 1979

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77 - 1615 - William C. Bush vs.
William R. Lucas

Gentlemen:

The following action has this day been taken in the above case:

An extension of time has been granted to and including August 7, 1979*

Very truly yours,
EDWARD W. WADSWORTH, CLERK

By S/ Betty Martinez /MBB
Deputy Clerk

cc: Mr. Harvey Elrod
Mr. Henry I. Frohsin

*MUST BE PHYSICALLY FILED IN THIS OFFICE BY THIS DATE.

APPENDIX A4

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Tel 504-589-6514
600 Camp Street
New Orleans, La.
70130

Gilbert F. Ganucheau
Clerk

October 4, 1979

TO ALL PARTIES LISTED BELOW:

No. 77 - 1615 - WILLIAM C. BUSH v.
WILLIAM R. LUCAS

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By (s) Sally Hayward
Deputy Clerk

cc: Mr. Harvey Elrod
Messrs. J. E. Brooks
Henry I. Frohsin